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In the Supreme Court
of the United States

OCTOBER TERM, 1971

No. 71-492

LLOYD CORPORATION, LTD.
Petitioner,

v.

DONALD M. TANNER, ET AL.,
Respondents.

BRIEF FOR RESPONDENTS

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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO ENGAGE IN ORAL ARGUMENT

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LLOYD CORPORATION, LTD.
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Respondents.

BRIEF FOR RESPONDENTS

QUESTION PRESENTED

Whether the right of free expression guaranteed by the First and Fourteenth Amendments to the United States Constitution includes the right to distribute non-commercial handbills in a peaceful and orderly manner within the malls and walkways of Petitioner's shopping center which are functional equivalents of sidewalks of a public business district at times when they are open to general public access, particularly when Petitioner permits non-commercial expression there by other outside groups whose ideas and purposes are approved by Petitioner?

STATEMENT OF THE CASE

This case involves a large urban shopping center opened by Lloyd Corporation in Portland, Oregon in 1960. A. 44. Since both the privately-owned shopping center and the business district in which it is situated are referred to in the record as Lloyd Center, some clarification of terminology seems desirable.

The business district known as Lloyd Center is the area within the heavy black line on Pl. Ex. 3, A. 115.[1] It consists of all or part of 38 city blocks, plus public streets and sidewalks and a public park. Lloyd Corp.'s privately-owned shopping center known as Lloyd Center consists of substantially all of the business district, except the public streets, sidewalks and park, and occupies approximately 50 acres. A. 17, 57-58. Lloyd Corp. also owns a considerable amount of additional property adjacent to or near the Lloyd Center business district, as shown by Pl. Ex. 3, A. 115.

While the business district and Petitioner's shopping center in it are substantially identical, they are distinguished in this brief by use of the term "Lloyd Center" to mean the business district and by use of the term "shopping center" to refer to Petitioner's privately owned property within the business district.

The central portion of Petitioner's shopping center complex is a single multi-level structure situated on what was formerly 18 city blocks and the vacated

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[1] All exhibits of Respondents cited in this brief were offered and received in evidence at A. 36.

street area between them, bounded by N.E. Halsey St., N.E. 9th Ave., N.E. Multnomah St., and N.E. 15th Ave. Pl. Ex. 3, 4 and 5, A. 115-117. This portion was referred to by Respondents in the District Court as the "main" part of Petitioner's shopping center (A. 19-20, 56-57), and by the District Court in its opinion as the "Mall." Pet. App. 8a, 308 F. Supp. at 129. It occupies about 25 acres, houses the largest part of the shopping center and a majority of the 60 commercial tenants, and enjoys the greater part of the parking area and pedestrian traffic within the shopping center. Pet. App. 8a, 308 F. Supp. at 129; A. 18, 58, 64.

The single unified structure of this main part of the shopping center, as well as the unified portion of the shopping center north of it between Halsey and Broadway Sts., was made possible by the City of Portland vacating and conveying to Lloyd Corp. the public streets and sidewalks which formerly traversed it. See Pl. Ex. 3, 4 and 5, A. 115-117, and Pl. Ex. 27 (a colored diagram of vacated streets not reproduced in the Appendix). This was done on Lloyd Corp.'s petition by Ordinance No. 101288 of the Portland City Council in 1954, as amended by later ordinances. Pl. Ex. 25, 24, A. 214, 193, 197. The public street and sidewalk area thus conveyed to Lloyd Corp. was 385,000 square feet, or 8.838 acres. Pl. Ex. 25, 26, A. 217, 221. One of the conditions of the City's conveyance was a requirement that Lloyd Corp. dedicate within five years land of equal area in the vicinity of the shopping center for widening existing streets or

"for opening new streets for the purpose of providing proper access to the areas affected by these street vacations." Pl. Ex. 24, A. 193, 208.

Within the main part of the shopping center are numerous broad malls and walkways running from the central mall to covered and open interior parking areas and to exterior public sidewalks and streets. A. 17-18; Pl. Ex. 11 O-11 V, A. 136-139. The principal malls are 50 feet wide. A. 64. A skating rink is situated in the central mall, and an auditorium used for public meetings is on the lower level of the main shopping center structure. A. 18, 50. The malls and walkways within the shopping center are open to the general public at all times. A. 49.

People can reach Petitioner's shopping center by automobile, bus, or on foot. Those arriving by automobile enter and leave the vast parking areas of the shopping center by two-way lanes across the exterior public sidewalks. See Pl. Ex. 11A, -B, -D, -E, A. 129-131. Departing automobiles must stop before crossing the sidewalk from the parking areas, but arriving vehicles are not required to do so in entering them. The large interior parking areas were designed to permit people to reach the shopping center without walking across streets and without being exposed to the weather. A. 86. People arriving by bus or on foot enter the shopping center from the exterior public sidewalks, either by a radial mall or walkway leading to the interior of the shopping center, or by one of the few store entrances opening onto an exterior public sidewalk.

While Petitioner maintained and enforced a policy forbidding distribution of any handbills on the malls, walkways and other areas open to the general public within its shopping center, it permitted a variety of non-commercial activities by outside organizations in these areas. These included football rallies, Veterans' Day ceremonies, campaign speeches by presidential candidates in election years, displays by Boy Scouts and antique automobile groups, and choral and other musical performances. A. 53, 60-61, 179-180. In a letter urging presidential candidates to campaign at the Lloyd Center, Petitioner's public relations director stated that the shopping center staff had adequately handled a crowd of 20,000 at an Ella Fitzgerald concert in 1962. Pl. Ex. 20, A. 186-187.

Petitioner's auditorium in the shopping center was made available without charge to the Cancer Society, Campfire Girls and Girl Scouts, and upon a rental basis for meetings of political and other groups. A. 50. National television coverage of the 1964 Oregon presidential primary election originated from the auditorium. Pl. Ex. 20, A. 186.

Lloyd Corp. has permitted some charitable solicitations and distribution of materials on the interior malls and walkways of the shopping center, while prohibiting others. The permitted activities included sale of "Buddy Poppies" by the American Legion, and solicitation of funds by bell ringers of the Salvation Army and Volunteers of America. A. 52. Literature on Portland tourist attractions was distributed from

did not interfere with pedestrian traffic in the malls and walkways. A. 41-42, 74, 82, 93. No littering was observed. A. 47-48. The only reaction of passersby to the handbilling noted by Lloyd Corp. personnel was that of one lady who came up to Petitioner's shopping center manager Horn and asked him what was being distributed. After being advised by him of the tenor of the leaflets, she stated her disapproval of Respondents' views. A. 48. Respondent Tanner testified that one passerby told him to "drop dead," and another urged a policeman to stop bothering Tanner. A. 74-75.

The District Court found that Lloyd Corp. invites everyone to the shopping center and that the Mall is open to the general public. It further found that the interior parking facilities and walkways of the shopping center serve the same purpose as streets and sidewalks of a public business district, and that the Mall is the functional equivalent of a public business district. Pet. App. 10a, 308 F. Supp. at 130.

The District Court also rejected a contention that Respondents could distribute their handbills as effectively from the exterior public streets and sidewalks as from the interior walkways of the Mall:

> "It would be difficult and perhaps dangerous for Plaintiffs to distribute their handbills from the public sidewalks to customers entering the Mall. Many customers do not use the public sidewalks and streets except when entering the Mall by automobile. In addition, it would be much more difficult to reach pedestrians on the public sidewalks than to reach them in parts of the Mall interior

through which most customers pass. I find that Plaintiffs cannot distribute handbills as effectively from the public streets and sidewalks as they can from the Mall interior." (Pet. App. 11a, 308 F. Supp. at 131)

The District Court held that Respondents had a constitutional right to distribute the handbills in question in an orderly and peaceful manner to passersby in the walkways of Petitioner's shopping center. The Court further held that threats of arrest by Petitioner's security guards, in the exercise of their police authority, caused Respondents to discontinue their handbilling, and constituted action "under color of law," in violation of 42 USC § 1983. Pet. App. 12a-14a, 308 F. Supp. at 131-132.

The decision and Declaratory Judgment and Decree of the District Court were affirmed by the Court of Appeals. It held that the District Court's legal conclusion followed from its factual determination that Petitioner's shopping center was the functional equivalent of a public business district, and that the factual determination was supported by substantial evidence. Pet. App. 2a-3a, 446 F.2d 545.

SUMMARY OF ARGUMENT

The peaceful and orderly distribution by Respondents of their political leaflets on a municipal sidewalk could not constitutionally have been prohibited or subjected to prior restraint. Neither litter, nor the availability of other effective means or places for communi-

cation of Respondents' views, nor fear of controversy or hostile public reaction justify a prohibition on the exercise of free communication on public sidewalks of a business district.

Similar rights of free speech and press exist on portions of privately owned property which serve as functional equivalents of public sidewalks in a public business district. The Courts below found, on substantial evidence, that the interior malls of Lloyd Corp.'s shopping center are functional equivalents of the public sidewalks which existed until the City of Portland vacated and conveyed them to Lloyd Corp. for inclusion in its shopping center.

The rationale of the holdings of this Court in *Marsh* v. *Alabama*, 326 U.S. 501 (1946), and *Amalgamated Food Employees Union* v. *Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968), followed by the Courts below in this case, is that to permit private owners of the functional equivalents of public sidewalks in the functional equivalent of a public business district to prohibit communication to the public on those walkways would be to frustrate the public's need for uncensored information. 326 U.S. at 508; 391 U.S. at 325-326; Pet. App. 14a, 308 Fed. Supp. at 132. The validity of this rationale is supported by the literature reporting current trends in the growth of private shopping centers in number and multiplicity of uses, to the point that many are the principal business districts of cities, if not cities in themselves. Lloyd Corp.'s development of its properties within Lloyd

Center and adjacent or near it has been an early example of these trends.

If First Amendment rights cannot be exercised on the functional equivalents of public streets and sidewalks within privately owned shopping centers, free speech and press will be restricted in direct proportion to the growth of such private business districts and their replacement of public business districts. This result was anticipated and forestalled by this Court's decision and reasoning in *Logan Valley*.

The argument of Lloyd Corp., and Amici Curiae urging reversal, that all handbilling "unrelated" to the business purposes of the shopping center property may be prohibited anywhere within the shopping center, should be rejected here, as it was below and in *Diamond* v. *Bland*, 3 Cal. 3rd 653, 477 P.2d 733 (1970), cert. den. 402 U.S. 988 (1971); *Sutherland* v. *Southcenter Shopping Center, Inc.*, 3 Wash. App. 833, 478 P.2d 792 (1971); and *State* v. *Miller*, 280 Minn. 566, 159 N.W.2d 895 (1968). The shopping center of Lloyd Corp. is a business and community hub which attracts a large number of people to a relatively small area. Neither the evidence nor Petitioner's Brief discloses any other place in Portland where Respondents' leaflets could have been distributed to comparable numbers of people in a similar period of time. Alternative means of communicating a political viewpoint, such as mass media advertisements, billboards and large scale mailings, are unavailable to those without financial means to afford them. Respondents could not communicate their political message to the

public as effectively by distribution of their leaflets elsewhere in Portland or by other means.

Substantial evidence supports the finding of the District Court that Respondents also could not distribute their leaflets to the public as effectively from the exterior public sidewalks around Lloyd Corp.'s shopping center. Distribution to the substantial number of persons entering and departing the shopping center parking lots by automobile would involve risks of safety and interference with automobile traffic.

Cases conditioning access of non-employees to the employer's business premises for union solicitations are distinguishable from shopping center cases, since they do not involve communication on private property open to the general public and serving as the functional equivalent of a public sidewalk in a business district.

Lloyd Corp.'s attempt to distinguish *Marsh* with the argument that its invitation to the public was limited to shoppers is contrary to the finding of the Courts below and the evidence.

Absolute prohibition of non-commercial handbilling in malls of a shopping center which are functional equivalents of public sidewalks in a business district would raise serious constitutional questions where, as in this case, public property has been conveyed to private ownership to permit the construction of a private business district displacing public streets and sidewalks, and public funds have been expended to reroute traffic around the shopping center and to im-

prove access to it. See *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715 (1961); *Evans* v. *Newton*, 382 U.S. 296 (1966); *Marsh* v. *Alabama*, 326 U.S. at 507.

First Amendment guarantees may not extend to private property open to the general public in certain limited circumstances. This may be the case where all who enter a store or other business property may be as effectively reached by communication of the message on nearby public sidewalks, or where the physical conditions of private property are so limited that "unrelated" communication to the public there would disrupt or unreasonably interfere with the use of private walkway for business purposes. *Cf. Taggart* v. *Weinackers', Inc.*, 397 U.S. 223 (1970). These circumstances are not present in this case.

The rule of law proposed by the Amicus Brief (p. 9) of American Retail Federation is inadequate. The proper rule of law may be stated as:

> "Owners of private property open to the general public may not completely prohibit the exercise of non-commercial communication to the public on portions of the property which serve as functional equivalents of public sidewalks in a business district, except where substantially all members of the public who could receive the communication on the private property can also be reached with a similar expenditure of time and effort on the exterior public areas, or where the communication necessarily causes unreasonable interference with the use of the private property for business purposes."

If *Logan Valley's* concept of handbilling "generally consonant with the use to which the property is actually put" (391 U.S. at 319-320) is viewed as a criterion for prohibition, rather than regulation, such a criterion is met by the evidence of the non-commercial activities sponsored or permitted by Lloyd Corp. on the malls of its shopping center. Respondents' handbilling was no more distracting or controversial than some of the activities approved by Lloyd Corp., and involved far less interference with pedestrian traffic on the malls than such approved activities as football and political rallies.

Lloyd Corp. seeks a rule of law which will permit owners of shopping centers to insulate the public from views and expression which the owners disapprove or find "controversial," while communicating to the public their approval of certain other views and non-commercial community activities. If Lloyd Corp. and other shopping center owners obtain these rights of censorship, the effective exercise of free communication will diminish as shopping centers grow in number, size and multiplicity of activities, and replace public business districts.

Lloyd Corp.'s attempt to justify prohibition of all handbilling as "reasonable regulation" is specious.

To permit shopping center owners to prohibit peaceful and orderly communication to the public by distribution of handbills on the functional equivalents of public sidewalks of a business district would be a large step backward in the protection heretofore af-

forded by the First and Fourteenth Amendments to freedom of speech and press for all people.

Balancing the rights of Respondents and the public to free communication of uncensored viewpoints against Lloyd Corp.'s property rights, under the circumstances of this case, results in the same tilt of the scale in favor of free speech and press as in *Logan Valley* and *Marsh*.

ARGUMENT

A. The First and Fourteenth Amendment Guarantees of Free Speech and Press Include the Right to Distribute Political Handbills on Public Sidewalks, Subject Only to Reasonable Regulation to Avoid Undue Interference With the Ordinary Uses of Such Property.

The significance of the First Amendment guaranty of free communication through distribution of pamphlets and leaflets has been recognized by this Court on many occasions. *E.g., Organization for a Better Austin* v. *Keefe*, 402 U.S. 415 (1971); *Lovell* v. *Griffin*, 303 U.S. 444, 452 (1938); *Martin* v. *City of Struthers*, 319 U.S. 141, 146-147 (1943).

If Respondents' leafletting had been done on a city sidewalk in the peaceful and orderly fashion shown by the evidence here, government could neither prohibit it nor impose prior restraints upon it. *Organization for a Better Austin* v. *Keefe*, supra; *Lovell* v. *Griffin*, supra. The fact that distribution may result in some littering does not justify prohibition of the constitutional right to exercise free speech and press.

Schneider v. *State*, 308 U.S. 147 (1939). See also *Wolin* v. *Port of New York Authority*, 392 F.2d 83, 92 (C.A. 2, 1968), cert. den. 393 U.S. 940.

Leafletting on public streets and sidewalks cannot be prohibited even if the exercise of this right could be carried out elsewhere. *Schneider* v. *State*, supra, 308 U.S. at 163:

> "[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place."

Nor will fear of controversy justify absolute prohibition of political communication on appropriate public property. *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503, 508-509 (1969). See also *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 269-271 (1964).

No one disputes that exercise of expression may be reasonably regulated in order to avoid undue interference with intended uses of the public or private property on which it takes place. See, *e.g.*, *Hague* v. *CIO*, 307 U.S. 496, 515-516 (1939). This case, however, does not involve any question of reasonable regulation, but an attempt by Lloyd Corp. to enforce a complete and absolute prohibition on any and all handbilling anywhere within its shopping center property.

B. The First and Fourteenth Amendment Guarantees of Free Speech and Press Extend to Non-Commercial Handbilling on Portions of Private Property Which Are Functional Equivalents of Public Sidewalks of a Public Business District; the Interior Pedestrian Malls of Lloyd Corp.'s Shopping Center Were Properly Found by the Courts Below to Be of That Character.

Similar rights of free speech and press exist on portions of privately-owned property which serve as functional equivalents of public streets and sidewalks in a public business district. In *Marsh* v. *Alabama*, 326 U.S. 501 (1946), members of the Jehovah's Witness sect were convicted of trespass for passing out leaflets on the sidewalk of the business district of a town wholly owned by a private corporation. This Court reversed the conviction.

> "Whether a corporation or a municipality owns or possesses the town the public in either case has an identical interest in the functioning of the community in such manner that the channels of communication remain free. As we have heretofore stated, the town of Chickasaw does not function differently from any other town. The 'business block' serves as the community shopping center and is freely accessible and open to the people in the area and those passing through. The managers appointed by the corporation cannot curtail the liberty of press and religion of these people consistently with the purposes of the Constitutional guarantees." (326 U.S. at 507-508)

Marsh was extended to shopping centers in *Amalgamated Food Employees Union* v. *Logan Valley*

an information booth in the central mall during the summer months, and pins promoting a local festival were sold there. A. 54. Presidential candidates were invited to distribute campaign material from a booth in the central mall. Pl. Ex. 20, 21, A. 187, 189.

Among the groups denied permission to use the interior malls and walkways of the shopping center for soliciting funds or other charitable purposes were the March of Dimes and Hadassah, a national Zionist women's service organization. Pet. App. 8a-9a, 308 F. Supp. at 129-130; A. 55. Permission for such use of the malls and walkways was granted or denied on the basis of whether Lloyd Corp. approved of the particular organization and its purposes and activities. A. 52, 56, 61.

Petitioner maintained a policy forbidding distribution of handbills on the malls and walkways within its shopping center. This policy was enforced by Petitioner's staff of uniformed security guards, who hold commissions from the City of Portland appointing them Special Police Officers "vested with full police authority." A. 19, 142-143; Pl. Ex. 6, 7, A. 118-119. The guards were instructed to treat persons who refused to cease handbilling as trespassers. A. 19; Pl. Ex. 8, 9, A. 120-125.

On November 14, 1968, a number of persons, including Respondents,[2] distributed leaflets to passersby

[2] The evidence is that approximately 5 persons were observed distributing the leaflets at Lloyd Center on this day. A. 73. Only 2 of them were observed anywhere near each other within the shopping center. A. 168.

at various points within the walkways of the Mall, the main part of the shopping center. A. 16. The distributors were associated with an informal group known as "The Resistance" or "The Resistance Community," whose common interest is opposition to the war in Vietnam.

The leaflets distributed by Respondents are Pl. Exs. 1 and 2, A. 111-114. They communicate both an invitation and a political message. The leaflets invited the public to a potluck dinner and meeting to be held that evening at a church,[3] characterizing it as a "Celebration of life," and a "communal feast and liturgy of liberation." The political statements affirmed opposition of The Resistance to the Selective Service System and to war in Vietnam and elsewhere.

Respondents and others distributing leaflets on the walkways within the shopping center were ordered by Petitioner's security guards to cease distribution there. A. 17. The guards threatened Respondents with arrest for trespass if they did not comply with these orders. A. 72-73, 77, 79, 81, 83. To avoid arrest, Respondents and others distributing leaflets within the shopping center moved to the exterior public sidewalks outside the shopping center to continue their distribution. A. 17, 74, 81, 84.

The distribution of the leaflets within the shopping center was at all times peaceful and orderly, and

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[3] Centenary Wilbur Methodist Church is located at 215 S. E. 9th Ave. P. Ex. 1, A. 112. This is 2 blocks south of Burnside St. and approximately 14 blocks south of the Multnomah St. side of Petitioner's shopping center. See maps, Pl. Ex. 3, A. 115, and Pl. Ex. 3A (not reproduced in Appendix).

Plaza, Inc., 391 U.S. 308 (1968). There, a Pennsylvania court, acting under a trespass statute, enjoined members of the plaintiff union from picketing anywhere within a privately-owned shopping center. Again, this Court reversed. The Court's description of the shopping center is comparable to Lloyd Corp.'s shopping center (391 U.S. at 310-311, 317-318). As here, the center was adjoined by public roads, had interior parking areas and sidewalks and was open to the general public. This Court found the shopping center similar to the business block which was the site of the leafletting in *Marsh* (391 U.S. at 317-318). It held the roadways and the sidewalks within the shopping center "functional equivalents of the streets and sidewalks of a normal municipal business district" (391 U.S. at 319), and the shopping center itself the "functional equivalent" of a business block in a municipality (391 U.S. at 325).

This Court held:

> "We see no reason why access to a business district in a company town for the purpose of exercising First Amendment rights should be constitutionally required, while access for the same purpose to property functioning as a business district should be limited simply because the property surrounding the 'business district' is not under the same ownership.
>
> . . . . .
>
> "All we decide here is that because the shopping center serves as the community business block 'and is freely accessible and open to the people in the area and those passing through,' *Marsh* v. *Ala-*

bama, 326 US at 508, the State may not delegate the power, through the use of its trespass laws, wholly to exclude those members of the public wishing to exercise their First Amendment rights on the premises in a manner and for a purpose generally consonant with the use to which the property is actually put." (391 U.S. at 319-320)

The District Court in this case found that Lloyd Corp.'s shopping center is the functional equivalent of a public business district and that its interior malls are functionally equivalent to sidewalks of a public business district:

> "In 1954, when the Corporation acquired land for the Center, the City of Portland vacated about eight acres of public streets for use by the Corporation. The ordinance by which the City vacated the streets recited that the City intended that the Corporation should use the land for the construction of 'a general retail business district.' In spite of this ordinance, the Corporation now asserts that the Mall is like an office building rather than like a public business district. Although the Mall's multilevel design is not yet common among modern shopping centers, the Mall is a prototype for future city planning. Its parking facilities and sidewalks serve the same purpose as streets and sidewalks of a public business district. I find that the Mall is the functional equivalent of a public business district." (Pet. App. 10a; 308 F. Supp. at 130)

As the Court of Appeals held (Pet. App. 2a; 446 Fed. 2d 545), these findings are supported by substantial evidence. Indeed, the record shows that for-

mer public street and sidewalk areas have been vacated, incorporated into a privately-owned, enclosed business district, and replaced by pedestrian malls within the shopping center. See map, Pl. Ex. 3, A. 115, and diagram of vacated public street areas, Pl. Ex. 27. These findings do not appear to be challenged in this Court by the briefs of Lloyd Corp. or of Amici Curiae.

C. The Public Need for Uncensored Information Would Be Frustrated If Private Owners of the Functional Equivalents of Public Sidewalks in a Business District Could Prohibit Communication to the Public on Those Walkways; the Validity of This Underlying Reasoning of the Marsh and Logan Valley Decisions Is Confirmed by Current Trends in the Growth and Development of Private Shopping Centers, Which Will Correspondingly Restrict Exercise of Free Speech and Press If These Rights Cannot Be Exercised on the Functional Equivalents of Public Streets and Sidewalks Within Them.

The rationale of both *Marsh* and *Logan Valley*, as well as of the District Court's decision in this case, is that to permit private owners of the functional equivalents of public sidewalks in the functional equivalent of a public business district to prohibit communication to the public on those walkways would be to frustrate the public's need for uncensored information. 326 U.S. at 508; 391 U.S. at 325-326; Pet. App. 14a, 308 Fed. Supp. at 132. This Court in *Logan Valley* recognized that such limitations on free expression in the context of the growth of large, modern shopping centers could stifle free expression by creating a "cordon sanitaire" around privately-owned business

districts, and thus limit free speech and press only to public business districts. 391 U.S. at 324-325. Without the "functional equivalent" doctrine of *Marsh* and *Logan Valley*, freedom of communication would be restricted in direct proportion to the continued growth of private shopping centers.

> In this context, this Court noted in *Logan Valley:* "The economic development of the United States in the last 20 years reinforces our opinion of the correctness of the approach taken in *March*. The large-scale movement of this country's population from the cities to the suburbs has been accompanied by the advent of the suburban shopping center, typically a cluster of individual retail units on a single large privately-owned tract. It has been estimated that by the end of 1966 there were between 10,000 and 11,000 shopping centers in the United States and Canada, accounting for approximately 37% of the total retail sales in those two countries." (391 U.S. at 324)

The growth of private shopping centers has continued apace since the 1966 figures quoted in *Logan Valley*. A recent article estimates the present number of shopping center complexes in the United States alone at 13,000, made up of 200,000 retail units accounting for 40% of all retail sales other than automobiles and building materials.[4] The same article

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[4] Chain Store Age, February, 1971, p. 25. The "yellow pages" of the current Portland, Oregon telephone directory list 14 shopping centers in the Portland metropolitan area.

Another article reports that 61% of Montgomery Ward & Co.'s sales and 73% of its pre-tax profits in 1969 came from its 82 outlets in shopping centers, and that the company plans

(Footnote 4 Continued on Page 22)

predicts construction of another 800 to 1,000 shopping centers in 1971, and a similar number in 1972. Another article estimates that there will be 25,000 shopping center complexes in the United States by 1985.[5]

Recent articles point out two other trends in the private shopping center phenomenon. The first is the construction of more shopping centers in downtown urban areas of cities, a trend in which Lloyd Corp.'s development in Portland is an early example. The second is the planning of shopping center complexes as part of much more comprehensive private developments approximating cities, with retail shopping areas including or surrounded by office buildings, apartments and houses. Both of these trends are discussed in "Shopping Centers Grow Into Shopping Cities," Business Week, September 4, 1971, p. 34-38:

> "No longer are shopping centers simply the small retail hubs they used to be: one or two department stores and a handful of shops and restaurants. Now, more and more, they are becoming miniature downtowns with three, four, and five department stores, scores of smaller stores and services, plus hotels, apartment houses, office buildings, cultural centers, churches, and theaters.
>
> . . . . .
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> "Along the way, shopping centers are developing the same kind of ambience and personality that

to open another 125 stores in shopping centers in the next 10 years. Sales Management, November 1, 1970, p. 34-36.

[5] Publishers Weekly, February 1, 1971, p. 54-55, February 8, 1971, p. 70-71.

> was previously found only in downtown business districts. In fact, many developers are taking their centers into downtown districts and trying to revitalize some of the very core areas that are hit hardest by competition from suburban centers.
>
> . . . . .
>
> "The key word is not so much 'giantism,' stresses President James W. Rouse of Rouse Co., one of today's leading developers. 'It is comprehensiveness. It is completeness—the integration of all the retail and commercial functions of modern life and the activities that people are involved in.'"

The same article refers to modern shopping centers as a "social gathering place," "communities within themselves" and "cities developing within cities."

Similar trends are reported in an article in Sales Management, November 1, 1970, p. 34:

> "New shopping centers will become more integral parts of their surrounding urban infrastructure. Some of the larger centers are already adding office parks to draw in light industry. Future centers may be focal points for new 'satellite cities' in metro areas. A case in point: the Northlake and Cumberland planned community projects by Crow, Pope & Carter (CP&C) in Atlanta. The projects will have two-level shopping centers surrounded by a mixture of apartments and townhouses, office parks, and community halls. Already such companies as Sears, J. C. Penney, and Gulf Oil Corp. have signed contracts. The idea, says CP&C marketing director Mark Van Brooks, will spread because 'people want to work and shop close to where they live rather than fight traffic congestion.'

"Shopping centers will be under increasing pressure to serve more than the family's consumption needs, especially those urban functions that fall in the cultural, educational and recreational areas. 'Shopping has become a family experience,' warns Bruce B. Dayton, president of Dayton Hudson Corp., 'and family shoppers are expecting more in all aspects of their lives; they want to be involved together in a variety of areas that interest them. Our center should be responsive to these expectations.' "[6]

Lloyd Corp.'s development of the downtown Portland area in the vicinity of Lloyd Center appears to be following these trends. The shopping center at its

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[6] See also Chain Store Age, September, 1971, p. 4:
"Eventually, the developers of these projects see the shopping center core as becoming a true 'downtown' area much like the downtown areas of many major cities, a focal point for everything that goes on in the communities surrounding it.

. . . .

"Non-retail developments such as banks and other services are already a part of many shopping centers, notes Rouse executive Ned Daniels. 'We have developed a number of office buildings in connection with our shopping malls, and we've also brought in such things as a library, a store-front church and theaters.' Rouse design director Ted Baker thinks the combination of shopping center core and planned community is really heading toward becoming a mini-city. 'In planning these projects,' Baker says, 'these additional non-retail facilities will become part of the project economics right from the beginning, as opposed to being developed as afterthoughts involving separate real estate transactions.' "

See also *Cottonwood Mall Shopping Center, Inc.* v. *Utah Power & Light Co.*, 440 F.2d 36 (C.A. 10, 1971), cert. den. — U.S. —, 40 U.S. L. Week 3165 (1971):
"Thus, to the great delight of promoters, enterpreneurs, mortgage lenders, building contractors and merchants, the modern shopping center is a part of the community. It seeks to seek and serve the public. And the law at appropriate times recognizes its public characteristics, whatever may be the nature of legal title." (440 F.2d at p. 42)

opening in 1960 was described in a newspaper article as a "city within a city."[7] Another article two years later, entitled "Lloyd Center Now 'Way of Life' for Local Folks," characterized Lloyd Center as a "tourist attraction," and continued:

> "In community activity, too, Lloyd Center has become firmly entrenched in the space of two years as a second hub of Portland. Furthering its established reputation in this respect, the center's management is considerably enlarging its planned program offering auto shows, symphony concerts, political meetings and dramas, to name but a few of the multitude of activities gracing Lloyd Center's open-air display spaces and enclosed auditorium."[8]

Still later articles, based on interviews with Lloyd Corp. personnel, report that the Corporation now owns some 130 city blocks, consisting of its properties within Lloyd Center, plus other adjacent and nearby lands occupied by the Sheraton Hotel, two other hotels, four office buildings, a high-rise Presbyterian retirement home and other businesses, and that the Corporation is developing the 130-block area in accordance with its master plan.[9]

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[7] *Oregon Journal*, July 22, 1960, Sec. 4, p. 1, col. 1.

[8] *Oregon Journal*, August 1, 1962, LC sec., p. 24, col. 2.

[9] *Oregon Journal*, July 28, 1971, p. 24, col. 1; *Oregonian*, November 10, 1970, p. 1, col. 2. See also the testimony of Lloyd Corp. President Von Hagen, A. 88-89.

Lloyd Corp.'s purchase of the 4.77-acre Holladay School site, adjoining the shopping center on the east (Pl. Ex. 3, A. 115), from the local school district was announced in the latter article. Plans for construction of a three-deck parking structure on this tract were subsequently announced by the Corporation's President Von Hagen. *Oregonian*, 5/23/71, p. 1, col. 3.

(Footnote 9 Continued on Page 26)

Thus, the comparison in *Logan Valley* (391 U.S. at 317-319) of modern shopping centers to the business district of a company town in *Marsh* and to "a normal municipal business district" becomes even more accurate with time. The attempt of Petitioner and Amici Curiae to distinguish *Marsh* from this case, upon the ground that *Marsh* involved prohibition of free expression in an entire town, appears clearly untenable in the light of reality. Many privately-owned shopping centers are becoming something closely approximating cities or the "downtown" business districts of cities, if, indeed, some of them cannot already be accurately so described.

Moreover, the growth of privately-owned business districts in and around shopping centers emphasizes the accuracy of the apprehension in *Logan Valley* (391 U.S. at 324-325) that free speech will be restricted as such complexes replace public business districts, if First Amendment rights cannot be exercised on the functional equivalents of public streets and sidewalks within private property open to the general public.

Some of the Corporation's additional development outside Lloyd Center has involved more vacation of public streets in order to permit "super blocks." See *Oregonian*, 1/21/68, p. 1, col. 8; *Oregon Journal*, 8/6/65, sec. 3, p. 5, col. 4.

D. The Fact That "Unrelated" Political Expression May Be Communicated to the Public Elsewhere Cannot Justify Complete Prohibition of it on Pedestrian Malls of a Privately-Owned Shopping Center Which Are the Functional Equivalents of Public Sidewalks of a Business District, at Least in the Absence of a Showing That Distribution of Respondents' Leaflets Elsewhere Would Reach the Large Numbers of People Attending Lloyd Corp.'s Shopping Center in a Similar Period of Time.

Petitioner attempts to distinguish and limit *Logan Valley* with the argument that political expression "unrelated" to the intended uses of the shopping center property by Lloyd Corp. and its tenants need not be permitted within the shopping center, since Respondents could distribute their leaflets on exterior public sidewalks around the shopping center and elsewhere in Portland.

As we have noted, the argument that leaflets could be distributed to the public elsewhere cannot justify prohibition of the exercise of First Amendment expression on public sidewalks. *Schneider* v. *State*, supra, 308 U.S. at 163. We submit that it also cannot justify complete prohibition of political expression on malls and walkways within private shopping centers which are functional equivalents of public sidewalks. Carefully reasoned authority so holds. *Diamond* v. *Bland*, 3 Cal. 3rd 653, 477 P.2d 733 (1970), cert. den. 402 U.S. 988 (1971); *Sutherland* v. *Southcenter Shopping Center, Inc.*, 3 Wash. App. 833, 478 P.2d 792 (1971). See also *State* v. *Miller*, 280 Minn. 566, 159 N.W.2d 895 (1968).

At the very least, the ability to communicate elsewhere a political message to the public is immaterial, if the owner of the private shopping center property which is the functional equivalent of a public sidewalk cannot show that communication of the message elsewhere would reach the large numbers of people attending the shopping center in a similar period of time.

The malls and sidewalks of a large shopping center are often the most effective and appropriate place for distributing a message to the general public for precisely the same reasons that Lloyd Corp. sponsors non-commercial activities there: large numbers of people are attracted to shopping centers that are frequently the business and community hubs of a metropolitan area. To say that Respondents could distribute leaflets elsewhere in Portland, but not within Lloyd Corp.'s shopping center, would be to deny Respondents access to a place where Respondents' message could be communicated to the largest number of people in the shortest period of time.

Neither the evidence nor the brief of Lloyd Corp. discloses any other place in Portland where Respondents' leaflets could have been distributed to comparable numbers of people in a similar period of time. Nor is there any showing that Respondents' distribution of leaflets elsewhere would have reached those persons who shopped only at Lloyd Corp.'s shopping center. The multiplicity of conveniently grouped stores in a private shopping center is, of course, intended to encourage "one-stop" shopping for a wide variety

of goods and services. Obviously, many of the people to be found on the malls and walkways of Lloyd Corp.'s shopping center on November 14, 1968 would not be found on the public sidewalks of any other business district in the Portland area at that time.

As the California Supreme Court stated in *Diamond* v. *Bland:*

> "Plaintiffs in the instant case cannot claim that effective alternative sites for their First Amendment activities are unavailable. If plaintiffs are barred from circulating their initiative petitions in the Inland Center, they are free to do so on the public streets and sidewalks in the surrounding community. Nevertheless, it is clear that they have a substantial interest in being able to solicit signatures and distribute information at the Center. Access to the thousands of persons who congregate on foot daily at the Center is a highly significant vehicle for the dissemination of ideas, particularly when the activity requires time for discussion and a place for obtaining signatures. The Inland Center serves as the primary business district for a large surrounding community and is the most effective and desirable location for the conduct of plaintiffs' First Amendment activities." (3 Cal. 3rd at 662; 447 P.2d at 738)

Persons seeking signatures on petitions in the *Sutherland* and *Miller* cases went to shopping centers for the same reason.[10] The leaflets in *Organization for*

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[10] In letters urging the 1964 presidential candidates to campaign at the shopping center, Lloyd Corp. cited among the advantages of its shopping center facility for this purpose:

"3. A built-in audience in a concentrated area. Thousands of people would be able to see and hear the . . . candidate."

(Footnote 10 Continued on Page 30)

available for communication of the message may be appropriate in many of the union solicitation cases which have so conditioned access of non-employees to an employer's business premises. Those cases do not involve private property which is open to the general public and which serves as the functional equivalent of public sidewalks. Industrial plants, as in *NLRB* v. *Babcock and Wilcox Co.*, 351 U.S. 105 (1956), are not generally open to the public at large. Nor are country clubs and resorts when they are surrounded by fences and accessible only through guarded gates, or otherwise restricted to prevent general public access. See *NLRB* v. *Tamiment, Inc.*, 451 F.2d 794 (C.A. 3, 1971); *NLRB* v. *S & H Grossinger's, Inc.*, 372 F.2d 26 (C.A. 2, 1967).

No such condition on free expression is appropriate, however, on portions of private property to which the general public is invited and has free access and which serve as functional equivalents of sidewalks of a public business district. *Central Hardware Co.* v. *NLRB*, — F.2d —, 76 LRRM 2873, 2877 (C.A. 8, 1971), cert. granted 40 U.S. L. Wk. 3314, No. 70-223 (1972).

Petitioner in its Brief (p. 18-19) attempts to distinguish *Marsh* with the argument that Lloyd Corp.'s invitation to the public was limited: "to shop while the Center is open" and to come upon its property "for shopping purposes." The findings of the District Court and the evidence rebut any such limitation on the extent to which Lloyd Corp. has opened its shopping center property to the public. As the District

Court found, "The Corporation invites everyone to the Center and permits anyone to enter the Mall," and "the Mall is open to the general public." Pet. App. 10a, 308 Fed. Supp. at 130. Many non-commercial activities on the malls of the shopping center and in its auditorium are invited or promoted by the Lloyd Corp. because they bring large numbers of people to the shopping center. A. 51. Obviously, Petitioner hopes that more people at the shopping center will mean more potential customers for its merchant tenants. Its invitation to the public, however, is clearly not limited to customers of its tenants.

Prohibition of free expression on areas within private property which are functional equivalents of public sidewalks of a business district would raise serious constitutional questions when, as in this case, public property has been conveyed to private ownership to permit the construction of a private business district displacing public streets and sidewalks, and additional public expenditures are necessary to re-route traffic around the shopping center and to improve access to it.[12] See *Burton* v. *Wilmington Parking Authority*,

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[12] Public streets were vacated and conveyed by the City of Portland to Lloyd Corp. to permit the construction of a "general retail business district." Pl. Ex. 24, A. 193, 202. The ordinance recited that such vacations "will be of material financial benefit to Lloyd Corporation" and that "it is contemplated in the future that additional street area will have to be opened in order to adequately take care of traffic congestion and ingress and egress to the Banfield Expressway when constructed." A. 202. The ordinance also provided that the equal area to be conveyed to the city by Lloyd Corp. was to be used for widening existing streets or "for opening new streets for the purpose of providing proper access to the areas affected by these street vacations," which was the Lloyd Center area. A. 208, 202.

(Footnote 12 Continued on Page 34)

365 U.S. 715 (1961); *Evans* v. *Newton*, 382 U.S. 296 (1966). See also *Marsh*, 326 U.S. at 507:

> "We do not think it makes any significant constitutional difference as to the relationship between the rights of the owner and those of the public that here the State, instead of permitting the corporation to operate a highway, permitted it to use its property as a town, operate a 'business block' in the town and a street and sidewalk on that business block."

It is doubtful, to say the least, that government can constitutionally convey public property and spend public funds to promote the creation of a private business district, with interior pedestrian malls which literally replace and serve the function of the former public sidewalks, if the private owner may thereafter prohibit the free expression which was previously available on the former public sidewalks.[13]

A newspaper article at the time the shopping center opened in 1960 reported that the city council was changing traffic on 4.5 miles of public streets in and near Lloyd Center from a two-way system to a one-way grid, and that the city was installing new signals at 15 intersections, erecting over 2,000 new traffic signs, and making curb cuts to facilitate traffic flow at 20 intersections. *Oregonian*, July 7, 1960, p. 1, col. 1.

[13] See *Smith* v. *Holiday Inns of America, Inc.*, 336 F.2d 630 (C.A. 6, 1964), involving racial discrimination by a motel situated on land purchased from and subject to supervision by a city re-development authority; *DDB Realty Corp.* v. *Merrill*, 232 Fed. Supp. 629 (D. Vt. 1964), involving the restriction of ski privileges to members of a corporation leasing property from a state; *Sams* v. *Ohio Valley General Hospital Ass'n.*, 257 Fed. Supp. 369 (ND W. Va., 1966), involving discrimination against doctors by a private hospital receiving federal funds through state allocation; *Kissinger* v. *New York City Transit Authority*, 274 Fed. Supp. 438 (SDNY 1967),

(Footnote 13 Continued on Page 35)

It may be that First Amendment guarantees do not extend to private property open to and used by the general public in certain peculiar and limited circumstances. Where all who enter a store or other particular private property may be as effectively reached by communication of the message on nearby public sidewalks, there is no need for exercise of the expression on private property. This may calm the fears expressed in the amicus brief of American Retail Federation for small individual enterprises. Similarly, when physical conditions of private property are so limited that exercise of free expression there would necessarily disrupt or unreasonably interfere with the use of a private walkway for business purposes, free expression there may weigh less heavily in the balance with property rights. *Cf. Taggart* v. *Weinackers', Inc.*, 397 U.S. 223 (1970).

Neither of these circumstances is present in this case. We have already cited the evidence that those arriving at the Lloyd Corp.'s shopping center by automobile and parking in its interior parking lots cannot be effectively reached by distribution of leaflets on exterior public sidewalks. Similarly, distribution of leaflets by Respondents here involved no interference with pedestrian use of the malls within the shopping center. The principal malls are 50 feet wide, and easily accommodate large crowds of people. A. 64; photographs, Pl. Exs. 11-O through 11-V, A. 136-139.

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involving "controversial" advertising refused by a private agency holding a contract from a public body to place all advertising on city subways.

A group of 5 scattered distributors of the leaflets in question here obviously presented no potential for unreasonable interference with pedestrian traffic on malls which have accommodated thousands for football rallies, presidential campaign speeches and other activities. A. 53, 60-61; Pl. Ex. 20, A. 186-187.

The rule of law proposed by the amicus brief (p. 9) of American Retail Federation does not give proper weight to the realities of modern shopping centers which serve as the functional equivalents of public business districts, to the high priority of free political expression recognized by the decisions of this Court, or to the public interest and investment in the creation of such shopping centers. The rule of law supported by *Marsh*, *Logan Valley* and other cases, harmonizing with both the great social significance of free expression and the realities of modern shopping center development, is:

> Owners of private property open to the general public may not completely prohibit the exercise of non-commercial communication to the public on portions of the property which serve as functional equivalents of public sidewalks in a business district, except where substantially all members of the public who could receive the communication on the private property can also be reached with a similar expenditure of time and effort on the exterior public areas, or where the communication necessarily causes unreasonable interference with the use of the private property for business purposes.[14]

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[14] While this case does not involve such property, it may

(Footnote 14 Continued on Page 37)

Even if *Logan Valley's* concept of handbilling "generally consonant with the use to which the property is actually put" (391 U.S. at 319-320) is viewed as a criterion for prohibition, rather than regulation, the facts in the present case clearly meet such a criterion. Respondents' distribution of leaflets in a peaceful and orderly manner to passersby on the malls of the shopping center is not significantly unlike other non-commercial activities there by outside groups which Lloyd Corp. has sponsored or permitted. E.g., campaign speeches and distribution of political literature by presidential candidates (A. 51, 60-61, Pl. Ex. 20, A. 186-187), Veteran's Day ceremonies by veterans' organizations (A. 53) and solicitations of funds from the public by the Salvation Army and Volunteers of America (A. 52). See *Wolin* v. *Port of New York Authority*, 392 F.2d 83 (C.A. 2, 1968), cert. den. 393 U.S. 940:

> "The Terminal building is an appropriate place for expressing one's views precisely because the primary activity for which it is designed is attended with noisy crowds and vehicles, some unrest and less than perfect order. Like a covered marketplace area, the congestion justifies rules regulating other forms of activity, but it seems undeniable that the place should be available for use in appropriate ways as a public forum. The admission of charity solicitors, glee clubs and automobile exhibitions without untoward incident evidences the ease with which the Terminal ac-

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be well to observe that private residences, hotel, apartment and office building lobbies, and store interiors, like the hallways of courthouses, are not functional equivalents of public sidewalks in a public business district.

commodates different forms of communication. To deny access to political communication seems an anomalous inversion of our fundamental values." (392 F.2d at 89-90)

The only difference in Respondents' expression from some Lloyd Corp. has permitted is the fear of the Corporation that distribution of a handbill opposing Selective Service and the war in Southeast Asia may be "controversial" and distracting to customer motivation to buy. As to distraction, what of the crowd attracted by football rallies, or the crowd of 20,000 who came to hear an Ella Fitzgerald concert Pl. Ex. 20, A. 186-187? As to the "controversial" message of the leaflets, what of a presidential campaign speech, or Salvation Army solicitation as seen by some members of other religious groups, or a display of National Guard weaponry?[15] In any event, the record shows no significant public reaction to Respondents' leafletting. A. 48, 74-75.

A reading of Petitioner's Brief, as well as the testimony of its shopping center manager and the president of the Corporation (A. 48-56, 71, 89-94), makes it clear that Lloyd Corp. seeks a rule of law which will permit owners of shopping centers to insulate the public from views and expression which the owners dis-

[15] A news article based on an interview with Petitioner's shopping center manager Horn summarizes a "wide variety of activities and exhibits put on by the center" in 1964, including a display of National Guard weapons and equipment upon the malls, which was characterized as turning the shopping center into "Camp Lloyd" for a day. *Oregonian*, January 10, 1965, LC sec., p. 2, col. 1.

approve or find "controversial," while remaining free to communicate to the public their approval of certain other views and non-commercial community activities. Lloyd Corp. approves and permits solicitation of funds from the public by the Salvation Army, but denies such permission to Hadassah. A. 52, 55-56. It permits use of its auditorium by Camp Fire Girls, Girl Scouts and the Cancer Society without charge, but requires other groups to pay a rental for its use. A. 50. It permits political speeches and distribution of campaign literature by presidential candidates, but not by candidates for other political offices.[16] A. 51, 60-61. Veterans' Day ceremonies on the malls by veterans organizations and sale of "Buddy Poppies" by the American Legion are permitted, but a leaflet opposing war in Southeast Asia and the Selective Service System may not be distributed. A. 52. Music over the shopping center public address system will be confined to the "light and carefree," and sculpture on the malls must be "humorous, abstract, and non-controversial in implication." D. Ex. 60, A. 254.

In short, Lloyd Corp. and other shopping center developers seek to create private business districts, and even "mini-cities," often with governmental assistance in the form of zone changes, vacation of public streets and re-routing of traffic patterns, but to maintain the absolute right to determine what ex-

[16] A resolution of the Lloyd Center Merchants Association, whose members consist of shopping center tenants, opposes "political campaigning (except by special invitation of the Center)." D. Ex. 59, A. 252.

pression may be communicated to the public on the functional equivalents of public sidewalks within the shopping centers. If Lloyd Corp. and other shopping center owners obtain these rights of censorship, the effective exercise of free communication will diminish as shopping centers grow in number and in size and replace public business districts. Moreover, the legal rule sought by Lloyd Corp. would undoubtedly further increase the competitive advantages of shopping center tenants over businesses located in public business districts by increasing the contrast between decaying, hurly-burly public business districts and bright, new and enclosed private business districts occupied by shopping centers.[17]

E. Complete Prohibition of All Handbilling on the Pedestrian Malls of Lloyd Corp.'s Shopping Center Cannot Be Justified as "Reasonable Regulation."

The attempt of Lloyd Corp. in its brief (p. 25-27) to justify its complete prohibition of all handbilling on the malls of the shopping center as "reasonable regulation" of this form of communication is clearly

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[17] The article on the growth of shopping centers in Business Week, September 4, 1971, p. 34, displays side-by-side photographs of shoppers in the spacious interior mall of a San Jose, California shopping center and of a contrasting "pedestrian-jammed downtown Chicago" sidewalk in a public business district.

The principal competitive advantage of a retail store located in a private shopping center, however, may be the "controlled competition" resulting from the owner's selection of tenants and the opposition of many shopping centers to location of "discount" stores within their boundaries. See discussion of this point in the same Business Week article, and in Publisher's Weekly, February 1, 1971, p. 54.

a mere play on words. *Logan Valley* speaks of regulation to prevent undue interference with the ordinary uses of the property. 391 U.S. at 320-321. Such regulation might be directed to the time, place and manner of the communication to the public, and would certainly strike a balance between the need for effective communication to the public and preservation of the ordinary uses of the property. See, *e.g.*, *Wolin* v. *Port of New York Authority*, supra, 392 F.2d 83 at 93-94; *Diamond* v. *Bland*, supra, 3 Cal. 3rd at 665, 477 P.2d at 741; *Jones* v. *Board of Regents*, 436 F.2d 618, 621 (C.A. 9, 1970). As these cases indicate, complete prohibition of communication with the public by handbilling or other orderly means cannot be justified as "regulation."[18]

In summary, the balancing of Respondents' First Amendment rights of freedom to communicate their message to the public against Lloyd Corp.'s property rights, under the circumstances shown by the evidence in this case, results in the same tilt of the scale as in *Logan Valley* and *Marsh*. As this Court observed in *Logan Valley*, 391 U.S. at 324:

> "The sole justification offered for the substantial interference with the effectiveness of petitioners' exercise of their First Amendment rights to promulgate their views through handbilling and picketing is respondents' claimed absolute right under

[18] For representative samples of this Court's decisions in distinguishing between regulation and prohibition of speech and press on public property, see *Niemotko* v. *Maryland*, 340 U.S. 268 (1951); *Kunz* v. *New York*, 340 U.S. 290 (1951); *Cox* v. *New Hampshire*, 312 U.S. 569 (1941); and *Hague* v. *CIO*, 307 U.S. 496 (1939).

a Better Austin v. *Keefe*, 402 U.S. 415, were distributed for several days at a shopping center. A suggestion in the amicus brief (p. 15) of American Retail Federation that Respondents could use other means of communication to the public, such as advertisements in the mass media, billboards, and large scale mailings, is obviously unresponsive to expression by those without financial means. As this Court noted in *Martin* v. *City of Struthers*, 319 U.S. at 146, distribution of leaflets "is essential to the poorly financed causes of little people."

As to Lloyd Corp.'s argument that Respondents could distribute their leaflets to the public as effectively from exterior public sidewalks around its shopping center, the finding of the District Court is to the contrary:

> "It would be difficult and perhaps dangerous for Plaintiffs to distribute their handbills from the public sidewalks to customers entering the Mall. Many customers do not use the public sidewalks and streets except when entering the Mall by automobile. In addition, it would be much more difficult to reach pedestrians on the public sidewalks than to reach them in parts of the Mall interior through which most customers pass. I find that Plaintiffs cannot distribute handbills as effectively from the public streets and sidewalks as they can from the Mall interior." (Pet. App. 11a, 308 Fed. Supp. at 131)

The finding is fully supported by the evidence. The

One of the letters also stated Lloyd Corp.'s belief "that our convenient location and setting would provide the largest audience President Johnson and Senator Humphrey could attract in Oregon." Pl. Ex. 20, 21, A. 186-189.

single structure constituting the main part of the shopping center, situated on 8 former city blocks and vacated street areas, has the majority of the shopping center's tenants and the greatest interior auto parking and pedestrian traffic. A. 18, 58, 64. As Lloyd Corp. intended in its design (A. 86), many persons arriving at the shopping center by automobile will go upon the exterior public sidewalks only when crossing them in driving in and out of the interior parking areas.[11] The lanes for such access and egress are two-way. Pl. Ex. 11A, -B, -D, -E, A. 129-131. Distribution of leaflets to persons entering or leaving the shopping center parking lots by automobile would involve substantial risks of safety and obstruction of traffic. Automobiles entering the parking lot traffic lanes need not stop before crossing the public sidewalk. Anyone attempting to hand a leaflet to the driver of an automobile crossing the public sidewalks outbound from the parking lots would be required to stand in the inbound automobile lane. Compare *Logan Valley*, 391 U.S. at 322.

The evidence is clear that distribution of leaflets by Respondents on exterior public sidewalks could not reach a substantial portion of the public coming to the shopping center by automobile and parking in its vast interior parking lots.

The requirement that no other effective means be

[11] The shopping center has more than 850,000 square feet of open and covered parking space affording offstreet parking for more than 1,000 vehicles. A. 18. The Corporation can apparently provide 8,000 free parking spaces within an easy walk from the central mall, of which 3,500 are under cover. Pl. Ex. 21, A. 189.